89-397

No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELI LILLY AND COMPANY,
Cross-Petitioner,

—v.—

MINDY HYMOWITZ and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

ELI LILLY AND COMPANY,
Cross-Petitioner,

—v.—

JANE DOLAN and ROBERT ABRAMS,
ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Whether a court-created theory of "market share" liability, which permits a plaintiff to recover damages from a defendant in the absence of any proof that the defendant caused plaintiff's injury, violates that defendant's due process rights under the Fourteenth Amendment to the United States Constitution?

2. Whether Section 4 of Chapter 682, Act of July 30, 1986, 1986 New York Laws 1567, as applied to plaintiffs who could have instituted timely personal injury actions under New York's former statute of limitations, deprives defendants of their rights to due process under the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

This cross-petition involves two of four appeals that were consolidated for argument and decision by the New York Court of Appeals.[1] The parties involved in the two cases that are the subject of this cross-petition are:

Hymowitz v. Eli Lilly and Company

Plaintiff	Mindy Hymowitz
Intervenor	Attorney General of the State of New York
Defendants-appellants in New York Court of Appeals	Eli Lilly and Company;[2] Abbott Laboratories; The Upjohn Co.; Merck & Co.; E.R. Squibb & Sons, Inc. (Petitioner)
Defendants	Ayerst Laboratories (a division of American Home Products Corp.); Winthrop Laboratories (a division of Sterling Drug, Inc.)

1 E.R. Squibb & Sons, Inc. has filed a petition for certiorari in 3 of the 4 appeals: *Hymowitz*, *Tigue* and *Dolan*. Cross-petitioner Eli Lilly and Company was not a party to the *Tigue* appeal and, accordingly, this cross-petition does not address that case.

2 The affiliates and subsidiaries (other than wholly-owned subsidiaries) of cross-petitioner Eli Lilly and Company are Hopewell International Company, Ltd.; United Insurance Company; Delta Holdings Inc.; Dong Yang Elanco Co., Ltd.; A.C.E. Insurance Company (Bermuda) Ltd.; X.L. Insurance Company Ltd.; BCR and Lilly KFT; Daewoong Lilly Pharmaceutical Company, Ltd.; Eli Lilly-Gohar (Private) Limited; Lilly, S.A. Spain; Valquimica, S.A.; Elmedin, S.A.; Dista, S.A.; Elanco Veterinaria, S.A.; Elquiber, S.A.; Grima Quimica, S.A.; Derly, S.A.; IVAC Iberica, S.A.; Elanco Industrial, S.A.; Elanco Ihara K.K.; Japan Elanco Company Limited; CBI Uniforms.

Dolan v. Eli Lilly and Company

Plaintiff	Jane Dolan
Intervenor	Attorney General of the State of New York
Defendants-appellants in New York Court of Appeals	Eli Lilly and Company; E.R. Squibb & Sons, Inc. (Petitioner); The Upjohn Co.
Defendant	Winthrop-Breon Laboratories

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Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Cross-petitioner Eli Lilly and Company ("Lilly") respectfully prays that a writ of certiorari issue to review the judgments and opinion of the New York Court of Appeals entered on April 4, 1989.

OPINIONS BELOW

Lilly adopts and incorporates by reference the list of opinions below that appear at page 1 of the petition of E.R. Squibb & Sons, Inc.

JURISDICTION

The judgments of the New York Court of Appeals rejecting cross-petitioner's federal constitutional claims were entered on April 4, 1989. No rehearing was sought.[3] E.R. Squibb & Sons, Inc., a co-defendant in these cases, obtained an Order dated June 23, 1989, from Justice Marshall extending the time within which to file a petition for certiorari to August 2, 1989. Counsel for Lilly received that petition on August 2, 1989. This cross-petition is filed pursuant to Sup. Ct. R. 19.5. This Court has certiorari jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Cross-petitioner Eli Lilly and Company adopts and incorporates by reference the constitutional and statutory provisions set forth at page 2 of the petition of E.R. Squibb & Sons, Inc.

STATEMENT OF THE CASE

Lilly adopts and incorporates by reference the Statement of the Case set forth at pages 3 through 11 of the petition of E.R. Squibb & Sons, Inc. Lilly adds the following comments regarding the *Hymowitz* case.

Plaintiff Mindy Hymowitz commenced her action pursuant to the so-called "revival" provision contained in Section 4 of Chapter 682 of the Act of July 30, 1986, 1986 New York Laws

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3 Lilly adopts and incorporates by reference footnote 13 appearing at page 11 of the petition of E.R. Squibb & Sons, Inc. with respect to the finality of these judgments.

1567 (the "Act" or "revival statute").[3] Plaintiff Hymowitz claimed her mother had used the medicine diethylstilbestrol in 1954, and that plaintiff learned this fact in 1974 when a physician informed her that she had vaginal adenosis, a condition she asserts was caused by the medicine. Later, she was diagnosed as having clear-cell adenocarcinoma.

Under New York law in effect before enactment of the revival statute, the statute of limitations began to run on the date of last exposure to the medicine. Plaintiff Hymowitz's claim accrued at the time her mother used the medicine: 1954. The applicable three-year statute of limitations was tolled during plaintiff's minority. Under then-controlling law, the statute of limitations on plaintiff Hymowitz's claim began to run on September 1, 1974.[4] Plaintiff had until September 1, 1977 to commence her action. Accordingly, even under pre-existing law, and without the benefit of the revival statute, plaintiff Hymowitz had some three years after diagnosis of her condition within which to commence a timely lawsuit. Nevertheless, the revival statute gave her and other plaintiffs who could have filed suit under prior law one additional year (from July, 1986 to July, 1987) in which to do so.

In the courts below, Lilly challenged the constitutionality of the Act *as applied* to claims that could have been pursued under pre-existing statute of limitations law. Lilly argued that the Act deprived defendants of due process rights by allowing plaintiffs to revive claims which they could have, but did not, commence under the former statute of limitations. The New York Court of Appeals summarily rejected that argument. In a single paragraph, the Court acknowledged that "some plaintiffs may have

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3 An earlier action, filed before the revival statute went into effect, was discontinued without prejudice by order of the trial court, which granted plaintiff leave, *nunc pro tunc*, to commence the second action.

4 Effective September 1, 1974, amendments to N.Y. Civ. Prac. L. & R. 105(j) and 208 (McKinney 1974) reduced the age of majority, for tolling purposes, from 21 to 18. Tolling for infancy for all persons then between the ages of 18 and 21 (including plaintiff Hymowitz) ended on the September 1, 1974 effective date. *Verra v. Koluksuz*, 74 A.D.2d 932, 426 N.Y.S.2d 151 (N.Y. App. Div. 1980).

known of their injuries . . . before the original limitations ran." Appendix of E.R. Squibb & Sons, Inc. 21a. Regardless of this fact, the Court determined that it would not interfere with the Legislature's determination that a blanket one-year extension of the statute of limitations would apply to all old claims, whether or not they could have been timely filed under earlier law. The Court found that any attempt to distinguish between plaintiffs who could have filed timely actions under the old statute of limitations and those who could not have done so would be "arbitrary." Appendix of E.R. Squibb & Sons, Inc. 21a.

REASONS FOR GRANTING THE CROSS-PETITION

I.

THE NEW YORK COURT OF APPEALS' "MARKET SHARE" THEORY, WHICH IMPOSES LIABILITY ON DEFENDANTS WHO CAUSED NO HARM TO PLAINTIFF, DEPRIVES THOSE DEFENDANTS OF EVEN MINIMAL DUE PROCESS RIGHTS

A. The Defendants' Due Process Rights Are Violated By A Theory That Imposes Liability In The Absence Of A Connection With Plaintiff Or Her Injuries.

The central feature of the "market share" theory created below is that a plaintiff need not establish that an individual defendant caused her injury—or had anything whatsoever to do with her—in order to extract damages from that defendant. Indeed, liability is imposed even on a defendant that affirmatively proves it did *not* make the product that allegedly caused a particular plaintiff's harm. New York's "market share" theory does away with traditional concepts of proximate causation and causation in fact. There need be no nexus between plaintiff's injury and an individual defendant's acts, omissions or product. By relieving plaintiffs of the need to demonstrate such a nexus—and by precluding defendants from establishing the absence of such a nexus as a defense—the court below trampled on the defendants' due process rights.

While states are afforded broad latitude in creating, modifying and even terminating common law rights and remedies, the actions of state legislatures and courts must meet at least minimal due process safeguards. In creating its version of "market share" liability, the court below failed to do so.

Due process requires that before a defendant may be called upon to respond in damages for a plaintiff's harm, there must be some connection—albeit a minimal one—between the defendant and that harm. That concept is reflected in the common law. *See Morrissey v. Conservative Gas Corp.*, 1 N.Y.2d 741, 155 N.E.2d 45, 152 N.Y.S.2d 289 (1956), and cases set forth at page 13 of the petition of E.R. Squibb & Sons, Inc. Removing the requirement that there exist some relationship between defendant and injury raises a significant due process question, as courts evaluating non-identification theories in the context of DES litigation have noted. *Pipon v. Burroughs-Wellcome Co.*, 532 F. Supp. 637, 639 (D.N.J.), *aff'd*, 696 F.2d 984 (3d Cir. 1982); *Tidler v. Eli Lilly & Co.*, 95 F.R.D. 332, 334 n. 5 (D.D.C. 1982).

The New York Court of Appeals did not merely relieve plaintiffs of the burden of proving that a defendant had anything to do with their injuries—a decision which, standing alone, deprives defendants of minimal due process protection. Rather, the Court went further, and held that even a defendant that affirmatively proves it did not make the product that caused injury will be held liable. *See* Appendix to Petition of E.R. Squibb & Sons, Inc. 17a. Accordingly, the theory created below does not merely lessen or shift burdens of proof, or draw inferences in favor of plaintiffs. Rather, it dismisses as irrelevant any proof that the defendant had nothing to do with plaintiff's harm. In short, the New York Court of Appeals determined that liability will be imposed on a defendant for harm it concededly did not cause, to a plaintiff with whom it had no connection and to whom it owed no duty, on the basis of an act performed by some other, unidentified entity. The due process guarantees of the Fourteenth Amendment should, at a mini-

mum, protect defendants from such arbitrary and irrational taking of their property.[6]

B. The New York Court Of Appeals Overstepped The Bounds Of Its Judicial Function In Creating The Compensation System That Is "Market Share" Liability.

Traditionally, the role of courts in directing the transfer of wealth between plaintiffs and defendants has been carefully circumscribed. Critical to the legitimacy and constitutionality of a court's ability to deprive a defendant of property and to transfer it to another is a defined relationship—typically a one-to-one connection—between a particular plaintiff and a particular defendant. The extent of the relationship may be limited or remote, but the existence of some relationship between an individual plaintiff and an individual defendant has distinguished the legislative and judicial functions, and has been viewed as a prerequisite to judicial action.

What the New York Court of Appeals has accomplished through its version of "market share" liability is a transfer of wealth between two classes—injured plaintiffs on the one hand, and manufacturers of DES on the other. In undertaking to resolve what it perceived as a societal problem, the Court of Appeals abandoned its judicial function and in effect acted as a legislature. While a legislature might, in an appropriate circumstance, constitutionally undertake to solve a perceived problem by transferring wealth between groups, it is not within the province of a court to do so.[7]

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6 In creating its form of "market share" liability, the New York Court of Appeals relies on a mandatory, irrebuttable—and unconstitutional—presumption, as is discussed at pages 17 through 19 of the petition of E.R. Squibb & Sons, Inc. Lilly adopts that analysis.

7 For example, it is probably not unconstitutional for Congress to impose, prospectively, a tax on all manufacturers of childhood vaccines in order to fund a no-fault compensation program for injuries possibly related to those vaccines. *See National Childhood Vaccine Injury Compensation Act*, 42 U.S.C. § 300aa-10 *et seq.* But it would

Creation of compensation systems to address perceived public policy problems under the guise of modifying tort law—the result accomplished by the decision below—is an inappropriate task for courts, and one for which they are particularly ill-suited. As Benjamin Cardozo observed:

> The judge, even when he is free, is still not wholly free. He is not free to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the "primordial necessity of order in the social life."

Cardozo, *The Nature Of The Judicial Process*, p. 112 (12th printing 1941). On a more practical level, courts must decide individual cases, brought by individual litigants, and limited by the record produced by those litigants (here, the record of a summary judgment motion). Unlike legislatures, courts are not free to convene hearings at large to hear from all parties who may be affected by a problem or its solution, or to conduct their own investigations of problems and potential solutions. Nor are most judges, unlike legislatures, subject to removal from office by the electorate if their perception of the correct solution to general societal problems proves to be wrong.

Here, the New York Court of Appeals took it upon itself to address what it perceived as a problem facing one class of residents of its state. The Court attempted to solve that problem by creating a class of defendants (one from which there is no practical opportunity to escape) and transferring the wealth of that class to another class—injured plaintiffs. It had to wrench fundamental concepts of tort law to do so. Its essentially legislative

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be unconstitutional for federal courts to create such a system, and to impose such a tax. *See* discussion at page 14 of the petition of E.R. Squibb & Sons, Inc.

action violates the defendants' due process rights. However, unlike a legislature, the Court of Appeals is not subject to review by the electorate. Review of its actions is only available by this Court.

Cross-petitioner Lilly recognizes that there appears to be no direct precedent for the view that due process is violated by judicial action that is legislative in nature. Nor is there contrary authority. Perhaps this is because it is so fundamental a principle of our jurisprudence that courts have heretofore not transgressed it. If there is a rudimentary rule of our law it is that courts do not tax, legislatures do. There can be no mistaking that the New York Court of Appeals has here taxed—it has transferred wealth from one category of citizen to another where the two categories have nothing whatsoever to do with each other. Where the judiciary so exceeds its function, the Fourteenth Amendment's due process guarantee is violated. The New York Court of Appeals could not raise an army, nor contract a treaty, nor appoint executive branch officers (or for that matter, judges of the Court of Appeals). It cannot tax. It has done so here. Due process does not permit such action.

II.

AS APPLIED TO CLAIMS THAT COULD HAVE BEEN TIMELY ASSERTED UNDER PRE-EXISTING LAW, THE REVIVAL STATUTE DEPRIVES LILLY OF ITS DUE PROCESS RIGHTS

A statute that is constitutional on its face may nevertheless be unconstitutional as applied to certain persons or under certain circumstances. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Snowden v. Hughes*, 321 U.S. 1 (1944); *United States v. Raines*, 362 U.S. 17 (1960). Lilly does not seek to challenge the facial validity of the Act's revival of stale DES claims. Rather, Lilly challenges the constitutionality of the Act insofar as it revives those DES cases—including *Hymowitz*—which could have been brought under existing statute of limitations law but, for whatever reasons, were not timely filed. Plaintiffs in that

subset of cases had the opportunity and incentive to commence timely actions under prior law. Accordingly, as to the claims of those plaintiffs, the Act is not rationally related to any legitimate legislative end, and, by infringing on Lilly's rights to repose under the former statute of limitations, deprives it of due process.

This Court has repeatedly noted the importance of the policies fostered by statutes of limitations. *See, e.g., Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, 488 (1980) ("statutes of limitations are not simply technicalities. On the contrary, they have been respected as fundamental to a well-ordered judicial system."); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348 (1944). Statutes of limitations recognize the injustice in requiring one to defend old claims, when witnesses have disappeared, memories have faded, and the search for truth is otherwise handicapped by the passage of time. Lilly and the other defendants were and are entitled to rely on the protection of these interests afforded to them by New York's statute of limitations in operation until 1986. By depriving Lilly of such rights, at least with respect to those claims that could have been timely brought under pre-existing law (and thus did not need to be revived), the Act unconstitutionally deprives Lilly of due process rights.

This Court has declined to hold that retroactive changes to statutes of limitations and similar "revival" measures are unconstitutional *per se*. *Campbell v. Holt*, 115 U.S. 620 (1885); *Chase Securities Corporation v. Donaldson*, 325 U.S. 304 (1945). By the same token, however, this Court has never held that the ability of courts and legislatures to revive stale claims is unlimited. Indeed, the decision in *Chase* supports the view that there are constitutional limits to such retroactive changes.

In *Chase* this Court acknowledged that "some rules of law probably could not be changed retroactively without hardship and oppression" and without offending the constitution. *Id.* at 315-316. In finding no constitutional infirmity in Minnesota's abrogation of the statute of limitations defense in *Chase*, this

Court pointed to the fact that the statutory change in question was made during the course of litigation, and therefore "defendant's statutory immunity from suit had [not] been fully adjudged . . . ." *Id.* at 310. Additionally, this Court pointed to the absence of "special hardships or oppressive effects" to defendant resulting from the retroactive change of the statute of limitations. *Id.* at 316.

Here, even assuming the *Chase* analysis remains good law,[8] application of the revival aspects of the Act to cases that could have been pursued under earlier law *does* offend constitutional principles of due process. Unlike the situation in *Chase*, the Act by its terms applies to cases that were barred or were "dismissed prior to the effective date of this Act" on the basis of the statute of limitations. Accordingly, this Act, unlike the statute in *Chase*, vacates final judgments actually entered, as well as voluntary discontinuances and the simple election of various plaintiffs—made a decade or more ago—to forego asserting claims. This Act does not apply only to cases pending at the time of its enactment, but to cases that were or could have been filed years before it took effect.

Additionally, the statute of limitations in effect before the revival statute vested Lilly and other defendants with significant rights of repose. As the statute of limitations ran, the defendants were no longer burdened with the defense of suits arising out of activities that happened thirty or more years ago, and that allegedly caused injuries of which plaintiffs were aware more than a decade ago. In those instances in which timely claims could have been asserted under the existing statute of limitations, Lilly and the other similarly situated defendants were entitled to rely upon their statutorily created right of repose in making business judgments about insurance, management of litigation costs and the like. Additionally, because of the long lapse of time between the acts complained of and the initiation of revived suits, witnesses have died, important documents have been lost and memories have faded. In such cases, the retroactive change of the statute of limitations—at least

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8 Lilly endorses and adopts the discussion of *Chase* set forth at pages 21 and 22 of the petition of E.R. Squibb & Sons, Inc.

with respect to those plaintiffs who could have brought suit under the prior statute—imposes "special hardships" and "oppressive effects" on the defendants. *Chase*, 325 U.S. at 316.

Finally, the revival statute, like all legislation, must be rationally related to a legitimate legislative end if it is to comport with due process requirements. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Insofar as the revival statute grants plaintiffs who could have brought a timely action under the old statute of limitations another chance to file suit, it is not rational. As to such plaintiffs, there was no harm for the New York Legislature to correct. It is not, as the New York Court of Appeals stated, "arbitrary" to exclude plaintiffs who could have brought suit under the old statute from the benefits of the new statute; rather, it is arbitrary to treat all plaintiffs alike, and to give an unwarranted second chance to those who elected not to pursue their rights in a timely manner. It is the arbitrary inclusion of that subset of plaintiffs that makes the revival statute irrational, and therefore unconstitutional.

CONCLUSION

For the foregoing reasons, if the petition of E.R. Squibb & Sons, Inc. for a writ of certiorari to the Court of Appeals of the State of New York is granted, then this cross-petition should also be granted.

Respectfully submitted,

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